OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 09-04 November 26, 2008

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Ronald Meisburg, General Counsel

SUBJECT: Guideline Memorandum Concerning Withdrawal of Recognition Based on Loss of Majority Support

I. Introduction

In Levitz, the Board ruled that an employer may lawfully withdraw recognition from an incumbent union only if it can prove that the union has actually lost majority support.[1] An employer that withdraws recognition bears the initial burden of proving that the incumbent union suffered a valid, untainted numerical loss of its majority status. The employer can establish this loss by a variety of objective means, including an antiunion petition signed by a majority of the unit employees. In appropriate cases, the General Counsel may then present rebuttal evidence to show that the union in fact enjoyed majority support at the time of the withdrawal or that the employer's evidence is unreliable. The burden then shifts back to the employer to establish actual loss of majority status by a preponderance of all objective evidence.[2]

Shortly after the Board released its decision in Levitz, the General Counsel issued a Guideline Memorandum regarding, *inter alia*, the processing of charges alleging an unlawful withdrawal of recognition.[3] This Memorandum updates that guidance.

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[1] Levitz Furniture Co. of the Pacific, 333 NLRB 717, 723 (2001).

[2] Id. at 725, n.49.

[3] GC Memorandum 02-01, Guideline Memorandum Concerning Levitz, dated October 22, 2001 at 4-7.

II. Dismissal of Charges When The Region Has Evidence of Actual Loss of Majority Status

Notwithstanding the employer's litigation burden in Levitz cases, the General Counsel's longstanding policy has been to decline to issue complaint when the General Counsel has sufficient objective evidence that the Union has lost majority support, even if the employer has no such evidence.[4] Thus, successive General Counsels have concluded that "issuance of a complaint to impose a collective-bargaining representative on employees against their stated will would run directly afoul of the policies of the Act."[5] Accordingly, the Division of Advice consistently has directed Regions to dismiss charges alleging an unlawful withdrawal of recognition, where the Region has objective evidence demonstrating that the incumbent union has numerically lost majority support,[6] regardless of whether the charged employer had objective evidence of actual loss at the time it withdrew recognition.[7]

The Fourth Circuit's recent decision in NLRB v. B.A. Mullican Lumber & Mfg. Co. ("Mullican Lumber") is

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[4] Famsa, Inc., Case 21-CA-37667, Advice Memorandum dated September 21, 2007 at 2-3; Christy Webber Landscapes, Inc., Case 13-CA-41300, Advice Memorandum dated December 29, 2003 at 3.

[5] Ibid.

[6] See, e.g., Famsa, Inc., Case 21-CA-37667, Advice Memorandum at 2-3; Christy Webber Landscapes, Inc., Case 13-CA-41300, Advice Memorandum at 3; Harcros Chemical, Inc., Case 33-CA-12544, Advice Memorandum dated June 12, 1998 at 3; Four Flags Motors, Case 14-CA-24794, Advice Memorandum dated December 19, 1997 at 2; Fashion Marketing, Inc., Case 22-CA-20734, Advice Memorandum dated March 27, 1996 at 2; Ayers Corp., Case 21-CA-29761, Advice Memorandum dated July 18, 1994 at 3.

[7] As discussed more fully in Section III below, the Regions should submit to the Division of Advice any cases that raise questions regarding whether the evidence in their possession adequately demonstrates actual loss.

consistent with the General Counsel's longstanding policy.[8] In Mullican Lumber, the Regional Office had in its possession a decertification petition but did not disclose the results of that petition.[9] The Fourth Circuit noted that it would be improper for the General Counsel to seek a bargaining order against an employer that had withdrawn recognition if the decertification petition in the Regional Office's possession demonstrated an actual loss of majority support.[10] The court did not, however, remand the case for a determination of whether the decertification petition evidenced loss of majority support for the union, because, as discussed below, the court found the employer had met its burden under Levitz.[11]

III. Determining What Constitutes "Objective Evidence" Of Actual Loss Under Levitz

The Board made clear in Levitz that to establish "actual loss" of majority support an employer may rely only on "objective evidence," offering as an example "a petition signed by a majority of the employees in the bargaining unit[.]"[12] An antiunion petition that is not tainted by prior unremedied unfair labor practices is adequate objective evidence of actual loss of majority status.[13] It is sufficient if 50% of the unit signed the petition.[14]

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[8] 535 F.3d 271, 283 (4th Cir. 2008).

[9] Id. at 282.

[10] Id. at 283.

[11] Id. at 284. If an Employer requests information regarding a decertification petition in the Regional Office's possession, the Region should submit to Advice the question of what information, if any, it may provide. See New Associates v. NLRB, 35 F.3d 828 (3d Cir. 1994); Mullican, 535 F.3d at 283.

[12] 333 NLRB at 725. See also Mullican Lumber, 535 F.3d at 282-283 (the Levitz standard makes the employer's belief irrelevant and "introduce[s] a truth-seeking test").

[13] See, e.g., KFMB Stations, 349 NLRB 373, 377 (2007) (decertification petition signed by a majority); Lexus of Concord, Inc., 343 NLRB 851, 851-852 (2004) (21 out of 22

The Board examines the petition language, however, to confirm that the employees no longer desire union representation.[15] For example, in Highland Regional Medical Center, the Board held that a petition entitled "'showing of interest for decertification'" was insufficient to establish actual loss, in light of extrinsic evidence that signatures were collected only for the purpose of obtaining an election.[16] On the other hand, in Wurtland Nursing, a Board majority concluded that petition language stating a "wish for a vote to remove the Union" more probably than not indicated the employees had rejected union representation.[17] Given the importance of a uniform approach in reviewing petitions with equivocal language, the Regions should submit such cases to the Division of Advice.

What is probative objective evidence other than a petition will depend on the circumstances of the case. In Mullican Lumber, the Fourth Circuit defined objective evidence as evidence "external to the employer's own (subjective) impressions," and held that hearsay evidence can be objective evidence and can be considered probative, particularly where the General Counsel never objected to its admission.[18] Applying those principles, the court found that a letter from the employee who prepared and filed a

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unit employees sent letter to employer and then signed decertification petition stating that they no longer wanted union representation).

[14] Renal Care of Buffalo, Inc., 347 NLRB 1284, 1286 (2006) (decertification petition supported by 15 of the 30 unit employees was adequate evidence of actual loss).

[15] See Highlands Regional Medical Center, 347 NLRB 1404, 1406 (2006), enfd. 508 F.3d 28 (D.C. Cir. 2007); Wurtland Nursing & Rehabilitation Center, 351 NLRB No. 50, slip op. at 1-2 (2007).

[16] 347 NLRB at 1406.

[17] 351 NLRB No. 50, slip op. at 2.

[18] 535 F.3d at 277-78.

decertification petition, informing the employer that 114 out of 220 unit employees signed decertification slips stating that they no longer wanted to be represented by the union, constituted "evidence of the type recognized in Levitz[.]"[19] The court relied "particularly" on this letter, as well as employee statements that the union had lost majority status.[20] Since neither the General Counsel nor the union presented any contrary evidence or objected to the authenticity or accuracy of the letter, the Fourth Circuit found that, although hearsay, the evidence was objective and sufficient to meet the employer's burden under Levitz.[21]

Similarly, the Office of the General Counsel has found sufficient objective evidence of a loss of majority support in a union steward's report that he had polled the unit employees and a majority was against union representation, along with the testimony of five employees who confirmed that the steward polled them about their union support.[22] Even though the employer had not seen a petition signed by a majority or the poll tally document and had not talked to the employees directly, the General Counsel concluded that an actual loss of support had been demonstrated.[23]

Not all "objective" evidence of loss of support is necessarily sufficiently probative to demonstrate "actual loss" as required by Levitz. For example, in Port Printing Ad & Specialties,[24] the Board found that the evidence relied on by the employer did not establish actual loss of majority status in the absence of an antiunion petition or

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[19] Id. at 279.

[20] Ibid. The court also referred to evidence that only a handful of employees attended union meetings and that the union presidency had been vacant for months.

[21] Id. at 277-279.

[22] Pacific Eco Solutions, Case 19-CA-29078, Advice Memorandum dated April 23, 2004 at 2-4.

[23] Id. at 3.

[24] 344 NLRB 354, 357-358 (2005), enfd. per curiam 192 Fed. Appx. 290 (5th Cir. 2006).

a poll of unit employees. Thus, hearsay evidence of discussions with four of the employees in an eight-person unit over a three-year period (2000, 2001, and 2002) did not "conclusively demonstrate" an actual loss in December 2003 when the employer withdrew recognition. The absence of collective-bargaining negotiations for four years likewise was not deemed persuasive, given that the contract had automatically renewed itself and the employer also did not request negotiations. Further, since a vacancy in the union secretary-treasurer's position would not have supported a good-faith doubt defense, it would also not be sufficiently probative to demonstrate actual loss of majority status.[25]

The post-Levitz cases indicate that objective evidence sufficient to demonstrate actual loss must be specific enough to show that a numerical majority of the unit no longer supports the union. Thus, in every post-Levitz case in which an employer successfully established actual loss, the employer presented evidence that a numerical majority no longer wanted the incumbent union as its collective-bargaining representative.[26] Where the employer failed to present a numerical loss of majority support, the Board found that the employer had not met its burden.[27] This is entirely consistent with the Board's decision in Levitz itself, where the Board specifically adopted "a more

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[25] Id. at 357. The ALJ also noted that the fact that only one unit employee continued to have dues deducted from his paycheck was also insufficient, because, at the time of withdrawal, the employer did not know whether other unit employees were paying their dues by means other than checkoff. Ibid. However, a decline in union membership would not be reflective of an actual loss of union support in any event. The Board has long held that a failure to pay union dues does not reflect a lack of support for union representation, because employees often are content to support the union and enjoy the benefits of union representation without joining the union or giving it financial support. See, e.g., Trans-Lux Midwest Corp., 335 NLRB 230, 232 (2001); R.J.B. Knits, 309 NLRB 201, n.2, 205 (1992); Odd Fellows Rebekah Home, 233 NLRB 143, 143 (1977).

[26] See cases cited supra at nn. 13 & 14.

[27] Port Printing Ad & Specialties, 344 NLRB at 357-358.

stringent standard for withdrawals of recognition" than the previously applicable good-faith doubt standard.[28] Furthermore, the Board's emphasis on *actual* loss, as opposed to good faith doubt, supports the view that numerical evidence of a loss of support is required.[29]

Therefore, strictly circumstantial evidence of loss of majority support, and certainly circumstantial evidence that would not have satisfied the no-longer applicable good-faith doubt standard, should be challenged by the Regions as insufficient under Levitz. While the Mullican court referenced such circumstantial evidence, the court relied "particularly" on the letter from the individual who prepared and filed the decertification petition; and that letter stated that the petition was supported by a specific numerical majority.[30] Because the Mullican court repeatedly cited the Board's decision in Levitz with approval,[31] Mullican should not be viewed as suggesting that the court adopted the pre-Levitz standard. Thus, the Regions should submit cases to the Division of Advice where there is an employer contention that urges a broader reading of Mullican than the one stated here.

Regional Offices should continue to dismiss Section 8(a)(5) allegations where there is direct evidence of an actual numerical loss of support for union representation,[32] e.g., a petition, a poll, or individual statements from a majority of the unit employees. Before dismissing on this basis, however, the Region should confirm that any petition, poll, or statements of disaffection are from at least 50% of the employees in the unit at the time recognition was withdrawn. The Region should also confirm that the signatures on any petition are facially authentic, based upon comparison with records in the employer's files or by witness authentication.[33] Likewise, the Region should

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[28] Levitz, 333 NLRB at 723.

[29] Id. at 724.

[30] 535 F.3d at 279.

[31] See 535 F.3d at 277-280.

[32] See GC Memorandum 02-01 at 4.

[33] Id. at 4, n.13.

investigate the reliability of the poll and in the case of statements of disaffection, investigate whether they were in fact made. In addition, the Region should investigate any allegations of taint, as well as any countervailing evidence of majority support, such as a reasonable prounion petition.[34]

The Regional Offices should submit cases to the Division of Advice where the evidence of a numerical majority is not conclusive. For example, the Regions should submit cases where the petition language is ambiguous in order to ensure a consistent approach to what language is sufficient to demonstrate that the signatory employees have rejected continued representation by the incumbent union.

Likewise, the Regions should submit those cases in which there are difficult questions as to whether the signatories are current unit employees, whether the number of signatories constitutes at least 50% of the appropriate unit, and whether the signatures are sufficiently current.

Similarly, the question of what probative value to assign to hearsay evidence of a numerical loss remains open. In order to develop a consistent application of the objective evidence test, cases in which the employer is relying upon such hearsay evidence should continue to be submitted to the Division of Advice.

In sum, Regional Offices should dismiss Section 8(a)(5) allegations where there is direct evidence of an actual numerical loss of majority support in the form of firsthand statements from a majority of the unit employees or an untainted and unambiguous antiunion petition. The Regions need not submit to the Division of Advice cases where the employer's evidence would have been insufficient

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[34] Id. at 5-6. See, e.g., HQM of Bayside, LLC, 348 NLRB 787, 788-90 (2006), enfd. 518 F.3d 256 (4th Cir. 2008) (employer could not rely upon antiunion petition signatures of employees who, prior to withdrawal of recognition, also signed a countervailing petition unequivocally supporting continued union representation); Parkwood Development Center, 347 NLRB 974, 974-976 (2006), enfd. 521 F.3d 404 (D.C. Cir. 2008) (same).

under the pre-Levitz good-faith doubt standard and may continue to issue complaints in those cases if otherwise appropriate. On the other hand, the Regional Offices should submit cases to Advice if the alleged loss of majority status is based on an ambiguously-worded petition; disputed unit composition; possibly stale evidence of disaffection; or hearsay evidence, such as hearsay evidence of employee sentiments or polling, as in Pacific Eco Solutions and B.A. Mullican Lumber.[35] This will enable us to maintain a consistent policy regarding the sufficiency of "objective evidence" under Levitz.[36]

/s/
R.M.

cc: NLRBU
Release to the Public

[35] See GC Memorandum 02-01 at 4. As the Fourth Circuit noted in B.A. Mullican Lumber, hearsay evidence, while inherently less reliable, can be probative, particularly when it is admitted without objection. 535 F.3d at 278.

[36] During their processing of these charges, the Regional Offices may consult the Division of Advice as to any investigative issues.